Supreme Court, U.S.
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No. 06-815

IN THE

Supreme Court of the United States

JAY REIFERT,

Petitioner,

v.

SOUTH CENTRAL WISCONSIN MLS CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), with its non-exclusive indicia of when products compete in the same market, must be modified, as the Seventh Circuit held, to require plaintiffs to provide a *mandatory* "economic analysis."

2. Whether, as the Seventh Circuit held, a large firm (the National Assn. of Realtors) selling a service to an entire market does not compete as a matter of law with smaller firms selling an equivalent service to the same market for the same price because (1) the smaller firms advocate the interests of specific racial or ethnic communities, or (2) the smaller firms have more restrictive sales policies than the large firm, or (3) because the smaller firms sell to a smaller group of buyers than the large firm.

3. Whether market definition disputes are factual questions, and if so, the quantum of evidence that will bar or require summary judgment.

4. Whether the rule of the National Assn. of Realtors barring realty agents from contacting the clients of other realty agents – a practice permitted by state law – violates the Sherman Act under *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

List of Parties

Petitioner is Jay Reifert.

Respondents are South Central Wisconsin MLS Corporation, Realtors Association of South Central Wisconsin, Inc., Robert L. Courter, Susan Matthews, David Stark, Robert Weber, Thomas Bunbury, Maurice W. Hill, Peter Sveum, Marshall Zwygart, and David McGrath.

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Petition for a Writ of Certiorari

Petitioner Jay Reifert respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Seventh Circuit is reported at 450 F.3d 312 and reproduced below at 1a. The order denying panel rehearing is reported at 2006 U.S. App. LEXIS 17692 and is reproduced below at 38a. The underlying decision of the district court is reported at 2005 U.S. Dist. LEXIS 23431 and reproduced below at 24a.

Jurisdiction

Judgment of the Seventh Circuit was entered on June 12, 2006 and the order denying panel rehearing issued on July 12, 2006. On Oct. 10, 2006, this Court granted the application of petitioner to extend the time to file this petition until Dec. 11, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutes Involved

The Sherman Act, 15 U.S.C. §1, provides in relevant part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." This Court has held that only unreasonable restraints are outlawed, not *all* restraints. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

The Clayton Act, 15 U.S.C. §§ 15, 26, allows private suits by individuals injured by violations of the antitrust laws.

Statement of the Case

Facts

Reifert is a real estate broker in Madison, Wisconsin. In order to purchase a subscription to the multiple listing service ("MLS") operated by respondent South Central Wisconsin MLS Corporation ("SCWMLS"), he was required to buy trade association services from three Realtor associations: (1) the local Realtor association (respondent Realtors Assn. of South Central Wisconsin ("RASCW")), (2) the state Realtors association (Wisconsin Realtors Assn.), and (3) the National Association of Realtors ("NAR").

If the three Realtor association products had not been tied to MLS services, Reifert would not have bought any of them. Reifert voluntarily buys trade association services from the National Association of Exclusive Buyer Agents ("NAEBA"), which advocates the philosophy that realty agents should not hold conflicting interests in a real estate transaction. NAEBA members like Reifert only represent buyers. In order to avoid conflicts of interest, Reifert and NAEBA members never represent sellers.

Reifert has a second objection to being forced to purchase Realtor association services: he is forced to agree to NAR rules that prohibit him from contacting property owners who have current listings with other realty agents. If it were not for the rule, Reifert would like the freedom to contact sellers – most of whom are also buyers – to advise them of his buyer-oriented services. Sellers listed with other agents have listing contracts giving the agent the exclusive right to represent them in their role as seller. Reifert has no desire to disrupt these contractual relations. Since he only represents buyers, he has no interest in

representing sellers. But property owners almost never have exclusive contracts with any agent to represent them in their role as buyers. Under Wisconsin law, Reifert would violate no law by inviting these sellers to engage him to represent them when buying another property. NAR rules prohibit such contacts. If he breaks the rule, he can be expelled from the MLS. Reifert objects to the requirement imposed by Realtor membership that he give up his right to vigorously compete with all other Realtors in the Madison area. He asserts his ability to earn a living has been impaired by the non-solicitation rules of the Realtor associations. He seeks an injunction against enforcement of the rule, but no damages for lost income.

District Court Procedural History

Reifert filed suit for damages under the Sherman Act in the U.S. District Court for the Western District of Wisconsin, claiming four years' coerced association fees as damages. He also sought injunctive relief. Jurisdiction was based on respondents' substantial impact on interstate commerce through four years of MLS activities: Sales of billions of dollars of real estate.

Reifert's major theory was that defendants had committed a tie-in violation, either as a *per se* violation, or a rule of reason violation.

Reifert asserted a *per se* claim was established by proof of five elements: (1) that RASCW had market power in the market for MLS services, that (2) there was a tie-in between MLS subscriptions and purchase of NAR trade association services,[1] (3) that NAR trade association services were a separate product

[1] Reifert asserted the per se violation occurred only as to NAR trade association services. Although three separate Realtor association products were forced (local, state, and national), he claimed a *per se* violation existed only as to NAR sales.

than MLS subscriptions, (4) that the tie caused a not-insubstantial impairment in the market for the tied product – trade association services sold to real estate agents and appraisers, and (5) that RASCW benefited from sales of the tied product.

Reifert asserted a rule of reason claim was established by proof of (1) an unreasonable restraint on competition in the market for trade association services, or (2) an unreasonable restraint on competition in real estate brokerage markets from NAR's no-contact rule. The parties filed cross-motions for summary judgment at the close of discovery.

To prove competition was impaired in the tied product market Reifert offered evidence of one dozen trade associations of residential real estate agents and/or appraisers which sold packages with similar features to the NAR package. One exhibit compared features of the thirteen trade association products:

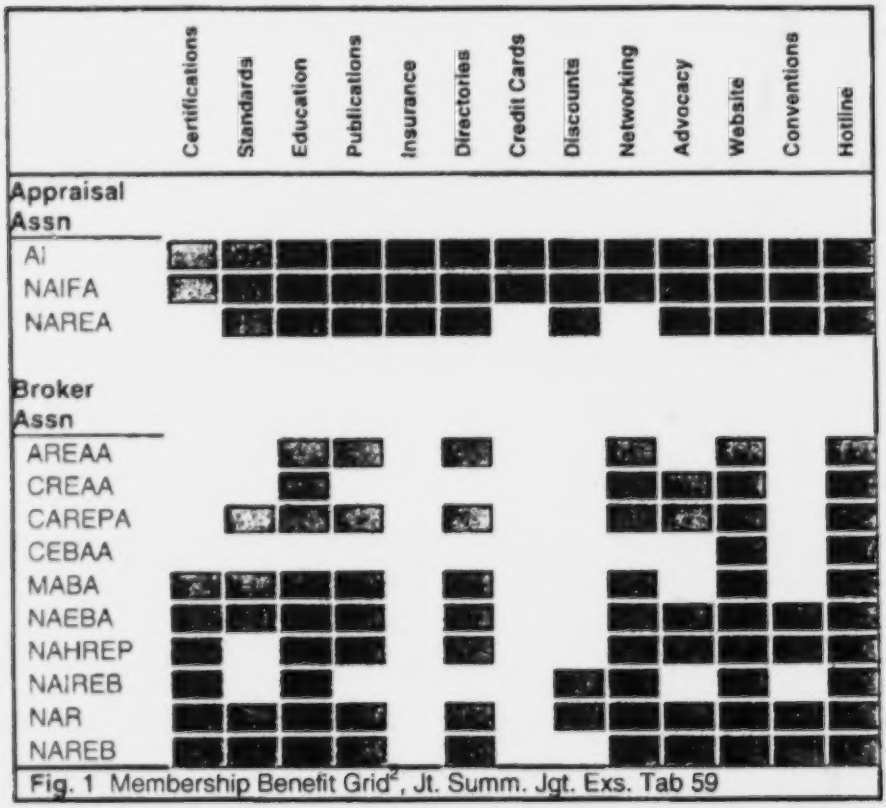

Fig. 1 Membership Benefit Grid[2], Jt. Summ. Jgt. Exs. Tab 59

A major defense of defendants was that NAR had no competition, i.e., none of the dozen trade associations offered by Reifert was in the same product market as NAR. The district court agreed, ruling that NAR had no competitors, and entered summary judgment for defendants.

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[2] Publications include software, newsletters, magazines, market information & statistics; Directories mean membership directories.

Seventh Circuit Procedural History

The Seventh Circuit held Reifert had proved: access to the MLS was a necessity for real estate agents and appraisers, and the information offered in the MLS was not available anywhere else. Virtually all active realty agents in the area subscribed to the MLS. Nearly every home was available in the MLS, giving it near-perfect market information. It is impossible to perform the tasks of a real estate agent or appraiser without the MLS. The court concluded that SCWMLS had sufficient market power to restrain trade.

The court also held Reifert proved trade association services (consisting of lobbying, social functions, courses, referral programs, contract forms, conventions, publications, and legal information) were separate from MLS subscription services (a database of properties that was searchable and filterable, detailed property information, compensation offerings, prior sales history, days on the market, and sale price of comparable homes).

Finally, the Seventh Circuit held Reifert had proved trade association services were tied to MLS services, i.e., that realty agents and appraisers could not purchase MLS services without purchasing trade association services from Realtor associations. Although SCWMLS did not require that MLS users purchase local Realtor association services from RASCW[3], a high percentage did so. SCWMLS did, however, require that all MLS users purchase national services from NAR.[4]

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[3] SCWMLS is the wholly owned subsidiary of RASCW.

[4] NAR does not sell services directly. They can only be purchased through one of NAR's 1,500 affiliated Realtor associations. When purchasing trade association services from a local Realtor association, a real estate agent is required also to purchase trade association services (Cont'd)

The Seventh Circuit did not rule whether Reifert's evidence proved RASCW had an economic interest in sales of the tied product, observing that this Court has never required such an element, although it had been required by the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits.

To meet the contention that NAR operated without competition, Reifert presented evidence in the district court that each indicia of *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) indicated that all twelve candidate trade associations were in the same product market as NAR. As part of his district court showing, Reifert also presented cross-price elasticity evidence demonstrating that NAR showed cross-elasticity with at least three of the candidate associations, including NAEBA.

The Seventh Circuit rejected all Reifert's evidence on market impairment because he did not provide an "economic analysis," which we take to be an opinion by an economist. App., at 14a-15a.

In addition, the Seventh Circuit held all dozen candidate trade associations could not compete with NAR as a matter of law. App., at 12a. We bold the reasons stated by the Seventh Circuit.

1. "**Serves a distinct ethnic community**." Rejecting the Asian Real Estate Agent Association, Chinese American Real Estate Professionals Association, Chinese Real Estate

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(Cont'd)

from the state Realtor association and NAR. In the event a person is located in one of the very few areas in the United States over which a local Realtor association has no jurisdiction, a real estate agent can buy trade association services from a state Realtor association, at which time she will be required also to purchase trade association services from NAR. Thus, Realtor association services are tied together, the legality of which is not challenged in this suit.

Association of America, National Association of Hispanic Real Estate Professionals, and National Association of Real Estate Brokers.

2. "**Covers only exclusive buyer agents**" Rejecting the Colorado Association of Exclusive Buyer Agents, Massachusetts Association of Exclusive Buyer Agents, and National Association of Exclusive Buyer Agents.

3. "**Serves only independent brokers**" Rejecting the National Association of Independent Real Estate Brokers.

4. "**Covers only appraisers**" Rejecting the Appraisal Institute, National Association of Independent Fee Appraisers, and National Association of Real Estate Appraisers.

The Seventh Circuit affirmed the district court's judgment for defendants.

Reasons for Granting the Petition

1. The Seventh Circuit's requirement of an "economic analysis" as a mandatory form of evidence departs from *Brown Shoe* and conflicts with the law of many circuits

Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1952) lists indicia of when two products occupy the same market:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as

> industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

None of these factors is mandatory. The boundaries "*may* be determined. . . ." The outer boundaries are found by "reasonable interchangeability of use *or* the cross-elasticity of demand between the product itself and substitutes." Thus, in defining a market, the proponent must use *either* reasonable interchangeability evidence, or cross-price elasticity evidence. If interchangeability evidence is used, any or all of the seven indicia may be used; none are required.

Nothing in that simple formulary requires that such evidence be presented through an expert witness. Until now, there were no known circuit court decisions that rejected *Brown Shoe* proofs merely because they were not presented through the mouths of experts.

In the Eleventh Circuit, *Thompson v. Metropolitan. Multi-List, Inc.*, 934 F.2d 1566, 1570-71 (11th Cir. 1991) no expert opinion testimony was required to prove two realty trade associations occupied the same product market:

> The Empire Board competes with the Board of Realtors and offers similar services, including a code of ethics and arbitration. The Empire Board is a predominantly African American association which services a predominantly African American clientele. Most of its members are located on the south side of Atlanta and most of its members traditionally represent buyers. . . . Empire competes in the market for professional affiliation with the Realtors.

Fifty-six words of evidence summary established that Empire competed with the Realtor association. The ethnicities were different and the orientations were different (the Realtor association was of mixed orientation; Empire was buyer oriented) but the evidence established competition as a matter of law.

The Ninth Circuit held a disputed issue of market definition prevented summary judgment in *Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 767 (9th Cir. 2001). No expert testimony was required to prove potential existence of a separate market for original equipment major brand vintage tires. The court relied on *Brown Shoe* indicia including testimony of industry participants, advertising material, and industry production data.

In *Foundation for Interior Design Education Research v. Savannah Collage of Art & Design*, 244 F.3d 521 (6th Cir. 2001) the Sixth Circuit had no trouble defining a market without expert opinion evidence. The district court opinion shows the dispositive evidence involved no expert opinion or "economic analysis."

> Savannah College admitted at oral argument that it was competing with accredited schools for the same pool of students, faculty, and staff. . . . Savannah College suggested that it was "severely crippled" in its ability to compete because of perceived differences by students, faculty, and staff in the quality of accredited versus non-accredited interior design programs. (Id.) However, "courts have repeatedly rejected efforts to define markets by price variances or ***product quality variances***. Such distinctions are meaningless where the differences are actually a spectrum of price and quality

> differences." *Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc. (In re Super Premium Ice Cream Distribution Antitrust Litig.)*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (emphasis added) (rejecting attempt by plaintiff to define the relevant market as "premium ice creams," because "all grades of ice creams compete with one another for customer preference" and "the relevant market is ice cream generally"). . . .

Foundation for Interior Design Educ. Research v. Savannah College of Art & Design, 73 F. Supp. 2d 829, 838 (W.D. Mich. 1999) [emphasis in original]

The Seventh Circuit expressly rejected this Court's teachings at pages 10a – 15a.

> Reifert employs a 30-year old decision from this Court, *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 308 (7th Cir. 1976). . . . While the "practical indicia" named in *Brown Shoe* and *Beatrice Foods Co.* are important considerations in defining a market, they were never intended to exclude economic analysis altogether. . . . This Court has emphasized the use of economic analysis in the law. To demonstrate competition in an antitrust case, the plaintiff *must provide an economic analysis of the relevant market*. . . . Lacking any economic evidence, Reifert has failed to show that the tying arrangement has foreclosed any portion of the market for real estate services. [App. 14a-15a, emphasis added.]

The Seventh Circuit switched its standards in a single page. In the quoted section, the court started by correctly noting the primacy of *Brown Shoe*. ("While the 'practical indicia' named in *Brown Shoe* . . . are important considerations. . . ."). It

followed with a correct observation ([the *Brown Shoe* practical indicia] "were never intended to exclude economic analysis altogether. . . ."), and a generalization ("This Court has emphasized. . . ."). Then it added a new requirement not present in any Supreme Court decision or in any other circuit: "To demonstrate competition in an antitrust case, the plaintiff *must provide an economic analysis of the relevant market.*" [emphasis added.]

Reifert presented evidence meeting the requirements of *Brown Shoe*, involving both substitution evidence and cross-price elasticity evidence. All was rejected because it was presented directly, rather than second-hand through an expert report. This Court should grant the petition for certiorari to correct the error of law by the Seventh Circuit in its departure from this Court's law and the law of other circuits.

2. The Seventh Circuit's rejection of candidate firms from the market based on racial or ethnic interests, sales standards, sales volumes, and product distinctions, violates the law of this Court and conflicts with many circuits

A tie-in violation requires proof of adverse impact in the tied product market. Such proof requires there be least one firm other than the tied product seller in that market. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984). In an early MLS-Realtor tie-in case, plaintiff's failure to offer even one candidate as a rival to the local Realtor association in the tied product market was fatal to the claim. *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir. 1988). In *Thompson*, another MLS-Realtor tie-in case, the plaintiffs

showed there were two competitors in the tied product market, satisfying the adverse impact element of the claim.[5]

Reifert defines sellers in the tied product market as regional or national firms selling trade association services to residential agents and appraisers.[6,7] He defines the buyers in that market as all residential realty agents and appraisers in the United States. It is undisputed NAR is a seller in that market selling to one million buyers, consisting of realty agents and appraisers.

Reifert offered twelve candidates as competitors to NAR in that tied product market. The district court and the Seventh Circuit rejected every candidate on grounds that violate the established law of this Court and many circuits.

Racial/ethnic differences

The Seventh Circuit rejected five candidate firms because they "serve[d] a distinct ethnic community." App. 12a. There was no evidence in the record to support the Seventh Circuit's

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[5] A second part to the adverse impact test is that a not-insubstantial volume of interstate commerce be affected by the tie-in. *Jefferson Parish*, *Id.* Reifert proved $167,959-$335,918 of involuntary dues was sent interstate by defendants to NAR in the relevant period. Reifert also showed millions of dollars of lost subscription dues to rival associations. Sect. 5D, below.

[6] This relationship is sometimes referred to as selling "memberships." Because memberships can be created without financial transactions in other contexts (i.e., being a member of a family, political party, or religious group), we believe use of the term "membership" is ambiguous and misleading, and should be avoided in the analysis of cases involving sale of trade association services.

[7] Because MLS users must buy three trade association services from separate Realtor associations at three levels, there are actually three tied products. In this case, Reifert utilizes only one tied product seller: NAR.

statement, so it must have judicially noticed a universally recognized fact. If the Seventh Circuit was right, this Court should say so and provide guidance as to many subsidiary questions.

The trade association being compared to was the National Association of Realtors, whose racial and ethnic makeup was not part of the record. The Seventh Circuit opinion only makes sense by reading NAR as Caucasian. That said, one can read the Seventh Circuit opinion as holding that Asian trade associations do not compete with Caucasian trade associations as a matter of law, even if all *Brown Shoe* indicators are present, and even if the Asian trade association offers better services at a lower price.

Does this rule of law collapse if NAR has a single Asian member? Is it no longer a Caucasian trade association? How many Asian members of NAR would it take before the Seventh Circuit rule falls apart? As a matter of law, should a trade association be typed by the *majority* ethnicity of its members? If so, is the Seventh Circuit rule still true? Does firm A with 55% Caucasians and 45% African-Americans as customers not compete with firm B whose customers' ethnicities are reversed?

How much Asian blood makes one Asian? What does mixed parentage do to the Seventh Circuit's classification of firms? How do we score a customer who is half-black, half-white? Will the law re-adopt long-despised words such as "octoroon" and "half-breed?"

In fact, none of the five "minority" trade associations required members to be of non-Caucasian ancestry. They sell services to persons of *all* races and ethnicities. The National Association of Real Estate Brokers, known as NAREB, testified at deposition through its president, Ronald Branch, who is also a member of NAR. Nothing in the record indicates the racial or

ethnic composition of NAREB. Mr. Branch was asked to estimate the racial/ethnic composition of NAREB but he was unable to do so. He stated NAREB was open to people of all ethnicities. What disqualified NAREB in the eyes of the Seventh Circuit was not its racial composition – since it was unknown – but its support for minority members in real estate. The Seventh Circuit's opinion shows a diligent study of the record so it must know that fact. For the Seventh Circuit's opinion to make any sense, it must have assumed NAR does not support minority members in real estate. Nothing in the record supports such assumption. Thus fleshed out, we read the Seventh Circuit opinion as holding that trade associations that support minority members in real estate do not compete with trade associations that do not support minority members in real estate. Are all these facts true as a matter of law?

Differing customer requirements

The Seventh Circuit rejected three trade associations as potential competitors of NAR because they "Cover[ed] only exclusive buyer agents." App. 12a. NAR also has exclusive buyer agents as customers. Andrew Show, the president of the National Association of Exclusive Buyer Agents ("NAEBA") estimated 90% of NAEBA members were NAR members. He also testified NAEBA recruited new members from NAR conventions. Thus, in making its ruling, the Seventh Circuit had in mind the undisputed fact that both NAR and NAEBA sold to the same pool of buyers: real estate agents representing only buyers.[8] The Seventh Circuit held as a matter of law the three exclusive buyer associations could not compete with NAR because the three sold *only* to agents agreeing to represent just buyers, while NAR sold to *any* real estate agent.

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[8] Many agents claim to be buyer specialists. An exclusive buyer agent represents buyers and never represents sellers.

In *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991) the question was the same as here: whether an MLS tie-in caused adverse impacts in the tied product market of trade associations selling to real estate agents. The favored trade association was a Realtor association with no buyer-seller orientation. The disadvantaged trade association was predominantly African-American; its customers mainly represented buyers. The Eleventh Circuit found they competed in the same market as a matter of law.

Reifert made the same showing as in *Thompson*. The handling of the question by the Seventh Circuit directly conflicts with the Eleventh Circuit's.

Product differences

The Seventh Circuit rejected the National Association of Independent Real Estate Brokers ("NAIREB") as a candidate competitor to NAR because it "serves only independent brokers." App. 12a. We read the statement as meaning that NAIREB sells only to independent brokers and NAR sells to independent brokers and other types of brokers. Thus, both NAIREB an NAR compete for the business of independent brokers.

Smaller number of buyers

The Seventh Circuit rejected three appraiser trade associations as potential competitors of NAR because they "Cover[ed] only appraisers." App. 12a. NAREB also sells association services to appraisers. Thus, NAR, NAREB, and the three appraiser associations compete for the business of appraisers.

In The Seventh Circuit departed from *Brown Shoe* in a fundamental way. One of the *Brown Shoe* indicia is whether firms have "distinct customers." As interpreted by many circuits,

that phrase means if two firms compete for the same pool of customers it tends to prove they are in the same market. The Venn diagrams at Fig. 2 make this clear. The diagrams shows two firms, large yellow firm A and smaller blue firm B. In 2A and 2B, there are customers that both firms (yellow and blue) sell to, which constitutes evidence A and B are in the same market. In 2C, there are no customers in common, tending to prove A and B are in different markets.

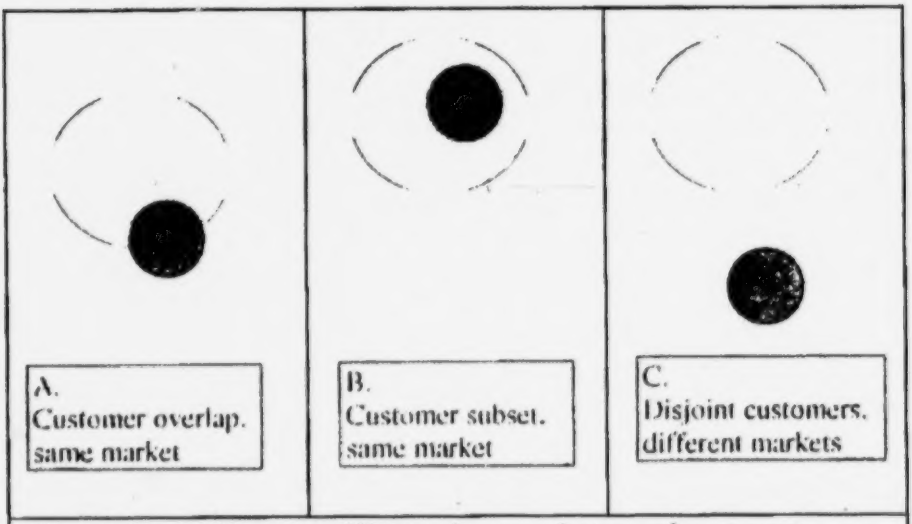

Fig. 2: Venn diagrams illustrating market overlap or not.

Defendants claim because NAR sells its product to a non-identical group of customers than the dozen firms offered by Reifert, NAR's market is therefore different than the markets of those dozen other firms. However, the crucial observation is that NAR sells the same trade association services for the same price to African-American agents, Asian agents, Hispanic agents, exclusive buyer agents, and appraisers, just as the twelve candidate associations do.

The circuits uniformly view overlapping customers as evidence of being in the same market. Third Circuit: *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997) (rejecting plaintiff's attempt to define market as pizza suppliers approved by Domino's for its franchisees since wider market of all pizza operators were customers of wider group of suppliers; Sixth Circuit: *Smith v. Multi-Flow Dispensers, Inc.*, 1999 U.S. App. LEXIS 9845 (6th Cir. 1999) (Supplying same product to different customer groups tends to prove customer groups are part of one market); Eleventh Circuit: *T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc.*, 931 F.2d 816, 824 (11th Cir. 1991) ("While a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the product sold to those customers.").

Overlapping customers does not force a conclusion that the products are in the same market. In *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966) the customers were the same: firms seeking some form of security services for their premises. The decisive factor that made central station services a separate market was that none of the candidate substitutes (such as watchman services) "appears to operate on the same level as the central station service so as to meet the interchangeability test of the *duPont* case." As the Tenth Circuit held in *Telcor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1132 (10th Cir. 2002), "Many courts have addressed the

situation where two or more products or services have similar functions but different physical characteristics. These cases make clear that the relevant inquiry remains whether the differences in type render the products poor substitutes. . . ."

Thus, the Seventh Circuit departed from the fundamental legal principles of this Court and other circuits by: (1) focusing on the degree to which the buyer populations of the thirteen firms differed, when it should have focused on the amount of overlap; (2) rejecting the dozen trade associations as candidates after finding insufficient buyer overlap, when it should have evaluated *all* the *Brown Shoe* factors; (3) not evaluating the evidence that the thirteen trade association service products were good substitutes, and (4) not evaluating Reifert's evidence of cross-price elasticity between NAR products and those of other associations.

3. The Seventh Circuit's resolution of the disputed market definition issue conflicted with the law of most circuits that such questions are factual, presenting a triable issue, presenting a matter not decided by this Court

The circuits have held that market definition is a question of fact for the jury. *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196 (1st Cir. 1996); *Weiss v. York Hospital*, 745 F.2d 786, 825 (3d Cir. 1984); *Thompson*, 934 F.2d at 1573-74 (11th Circuit 1991).

In contrast, the Seventh Circuit opinion appears to treat the question as one for the court to resolve. App., at 12a-15a. Reifert submits that at a minimum, he provided sufficient evidence to support a finding that there is a national market in which the buyers are residential realty agents and appraisers, the sellers are national and regional trade associations, and the product being sold is the package of services presented in Figure 1, above. Three circuits describe

the burden of proving competitors in the tied product market as "minimal" or "modest." *Wells* ("the plaintiff must make some minimal showing of real or potential foreclosed commerce caused by the tie, if only as a matter of practical inferential common sense," 850 F.2d 803, 815, fn. 11); *Osborne v. Sinclair Refining Co.*, 286 F.2d 832, 841 (4th Cir. 1960) ("modest showing"); *Thompson*, 934 F.2d at 1570-1571. It was not incumbent on Reifert to demonstrate the outer bounds of the tied product market.

We have found no ruling by this Court on the question of whether market definition is for the court or the jury. Thus, it appears to be one of first impression. The Court should grant certiorari to answer this important question, and decide whether Reifert met his minimum burden, and if so, whether he established at least two competitors in that market.

4. In ruling NAR's no-contact rule was reasonable, the Seventh Circuit departed from this Court's ruling in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978)

Under *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), it is a Sherman Act violation for competitors to enact "ethical" rules that prohibit competition. NAR's non-solicitation rule prohibits Realtor association members from contacting sellers who have listed their properties with other Realtors. The rule prohibits agents from seeking to represent sellers when buying another property. It takes away from rookie agents one of the most potent tools they would otherwise have to compete with established agents. The rule stifles competition.

Reifert's desire to send targeted mail to real estate sellers with listings with other realty agents is legal under Wisconsin law, which recognizes the right to compete. Competition benefits

both competitors and consumers. *Landess v. Borden, Inc.*, 667 F.2d 628 (7th Cir. 1981) (applying Wisconsin law). Defendants' MLS tie-in strips MLS users of their right to compete, because when they are forced to buy a Realtor membership, one of the trade association "benefits" is enforcement of NAR's code of ethics, which prohibits competition under the non-solicitation rule.

Professional Engineers sustained a facial attack; this Court did not require the plaintiff to set forth evidence of harm to competition, since the rule itself was a "frontal assault" on the policy of competition under the Sherman Act.

In deposition testimony, NAR expressly acknowledged that agents such as Reifert were prohibited from contacting sellers, even though no listing contracts would be violated. NAR further acknowledged it had no factual basis whatsoever to justify its complete prohibition of such competition. That is, NAR had no facts to establish even the slightest procompetitive benefit from the prohibition. The penalties for violating the non-solicitation rule are fines up to $5,000 and MLS suspension up to three years.

The lower court noted that Reifert and other agents can make "general announcements" for their services. Reifert seeks to send *targeted* messages to sellers, something expressly prohibited by the rules. The lower court misapplied *Professional Engineers* by failing to recognize that Reifert met his burden of showing the plainly anticompetitive effects of the outright prohibition of contacting sellers who had signed listing contracts with others. Reifert met the burden by showing that (1) he specialized in assisting buyers and never represented sellers; (2) his business would be best promoted by targeted mailings to sellers, nearly all of whom were buyers; (3) general mailings (i.e., everyone in a given geographic area) would be wasteful, since nearly all the messages would go to people who were not

in the market; (4) his messages would never have the effect of interfering with a listing contract between a seller and a real estate agent, since Reifert never took such listings; and (5) NAR acknowledged it had no facts showing any procompetitive effects of the rule.

The Seventh Circuit held at 17a-18a that the rule was saved because "if agents were reluctant to post their listings, for fear that other agents would steal their clients, the market would become less transparent and less efficient." There are several flaws with that rationale: (1) there was no evidence that even one agent would refrain from listing a property for fear of such theft; (2) owners demand to have their properties publicized through MLS listings and there was no evidence that such demands would be overcome by the hypothesized trepidations; (3) the cited rules of Alaska and Massachusetts (non-NAR regimes) were far narrower, allowing more competition by agents, proving MLSs will function with less restrictive rules; (4) the notion of "theft of a client" is wholly at odds with vigorous competition, where the person being "stolen" has no contract with any agent to represent them as a buyer, and finds the soliciting agent a better choice; and (5) Wisconsin already has laws protecting contracts, and for NAR and RASCW to add its own layer of anti-competitive restraints burdens competition with no pro-competitive benefits. *See*, *Landess v. Borden, Inc.*, 667 F.2d 628 (7th Cir. 1981) (holding Wisconsin law favors vigorous competition, no contract violated by competitive tactics of one litigant).

Wisconsin gave Reifert the right to compete vigorously when it issued him a broker's license. Defendants took that right away.

5. Other issues support certiorari

A. The Circuits are requesting guidance The Seventh Circuit opinion stated, "Economics, like other social sciences, has its share of counterintuitive findings, so observing things that to the untutored eye seem to be substitutes need not mean that they *are* good substitutes." App., at 11a [internal quotations omitted].[9] The First and Tenth Circuits have observed, "There is no subject in antitrust more confusing than market definition." *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 597 (1st Cir. 1993); *Telecor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1131 (10th Cir. 2002).

It would be appropriate for this Court to provide additional guidance to the circuits on market definition principles. This case offers a useful vehicle.

B. Reifert represents hundreds of thousands of others forced to purchase unwanted NAR services Reifert's record evidence was that MLS-Realtor tie-ins cover 84% of the 100 top US markets. In the remaining 16% of the markets, realty agents and appraisers have a choice whether to buy trade association services from NAR. Depositions in Massachusetts and Alaska, where statewide MLSs do not force purchase of NAR trade association services, establish that 30% of those MLS users do not purchase the NAR package. When projected over the one million NAR members, that figure indicates that over 250,000 realty agents and appraisers are coerced into buying the NAR package.

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[9] We read the statement as acknowledging that Reifert's evidence tended to prove that the trade association service products of the thirteen firms "seem to be substitutes" and the Seventh Circuit's ruling was "counterintuitive."

C. NAR dominates the trade association market but did not earn its prominence Reifert's record evidence shows NAR holds a 97% market share of the realty agent trade association market and 65% of the appraiser trade association market.[10] NAR didn't get there the honest way – through skill, foresight, and industry – but through forcing sales through MLS tie-ins.

D. Rival trade associations lose sales due to tie-ins Reifert obtained sales data for five of the twelve trade associations. His record evidence groups sales rates for these associations in the closed vs. open MLSs[11] in the top 100 markets. Comparing sales rates creates a cross-price elasticity study. In the closed MLSs, 30% of realty agents/appraisers perceive the price of the NAR package to be free, since it's an undesired add-on to the combined price paid for the tying product: MLS. In moving to open MLSs, realty agents/appraisers perceive the NAR package at its true price, since it's offered separately. Thus, in the open MLS markets realty agents and appraisers perceive the NAR package are relatively more expensive than perceived in closed MLS markets. If there were cross-price elasticity, one would expect that sales rates of some of the five associations to rise in open MLS regions as compared to closed MLS regions.

Reifert's record evidence collected such data, presented and reformatted in Figure 3. The sales rates for all five associations are normalized at 100% in the closed MLS regions. The results show that four associations experience higher sales rates, and

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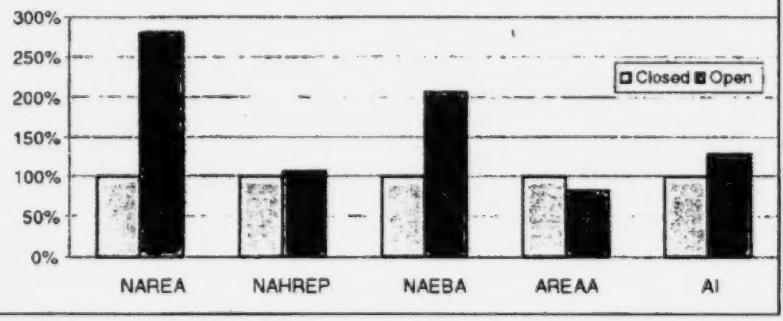
[10] As indicated above, it is possible the market for trade association services for realty agents and the trade association market for appraisers are a single market. Further work would be required to determine whether they are separate markets or the same. However, nothing in this case rides on whether it's one market or two.

[11] A closed MLS is one that requires purchase of the NAR trade association package; an open MLS does not.

one association shows lower rates, in open as compared to closed MLSs. Two of the results are too close to judge without expert analysis, which Reifert did not present. One association (Appraisal Institute) showed sales rates 25% higher in open MLS regions as compared to closed MLS regions. The remaining two association results are whoppers. Reifert's association, NAEBA, has twice the sales in open regions as compared to closed regions. The result for the National Association of Real Estate Appraisers is off the charts, so to speak. Its sales rate in open MLSs is more than 2.5 times its sales rate in closed MLSs. These results are easy to interpret without the need for economic analysis. They indicate NAEBA, NAREA, and AI show cross-price elasticity, proving they compete with NAR.

Fig. 3 Percent Association Membership in Open vs. Closed MLSs



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Record evidence established NAREA sells about 5,000 memberships per year at $215 each, which is about $1 million per year. That occurs in a nation where 84% of MLS markets are closed. The data in Fig. 3 indicate the sales by NAREA would be millions of dollars higher if MLSs were open. Sales increases by NAEBA and AI would also be substantial. Reifert easily demonstrated a not-insubstantial diversion of trade association revenues away from NAR's rivals.

Cross-price elasticity data shows that the services offered by at least three of the twelve are not being sold to as many realty agents and appraisers as would occur without the tie-in. The MLS-Realtor tie-in substantially lowers output for at least three trade associations.

E. Competition is suppressed in the $60 billion residential real estate brokerage market The Government Accountability Office report to the House of Representatives, *Real Estate Brokerage – Factors That May Affect Competition*, of August, 2005, concluded there was a lack of price competition between real estate brokers.[12] "One potential cause of the industry's apparent lack of price variation is the use of multiple listing services (MLS), which facilitates cooperation among brokers in a way that can benefit consumers but may also discourage participating brokers from deviating from conventional commission rates." p. 2 of 32. As described in the report, there is a new breed of realty agents in the market place that offers rebates to buyers who purchase a home through them. It works thus: the buyer purchases a home through such a buyer agent. The buyer agent typically receives half the commission paid by the seller to the seller's agent. The buyer agent then rebates part of the commission received to the buyer. Rebates can be many

[12] GAO.gov/new.items/d05947.pdf, last visited Dec. 7, 2006.

thousands of dollars. Such buyer agents present effective price competition in the marketplace.

At any given time, only about 5% of potential home buyers are looking to buy a home. The other 95% already have homes and don't plan to move. Thus, it would be desirable from a buyer agent perspective to spend marketing time and money on the 5% who are in the market. That 5% in the market to buy a home is nearly congruent with the pool of people selling a home – nearly all of whom list the home in the MLS. Thus, a buyer agent would ordinarily want to send buyer-oriented literature to sellers in the MLS as the most efficient use of marketing resources. This is prohibited by NAR rules, effectively enforced on Reifert since he's forced to adhere to NAR's rules as part of the MLS tie-in.

The Seventh Circuit acknowledged NAR's rule, as imposed by RASCW, prohibits Reifert from contacting sellers to offer buyer-oriented services. The heart of the Seventh Circuit's reasoning is the handshake rule: the first to shake the prospect's hand owns the prospect. Every state, including Wisconsin, has a body of law prohibiting people from inducing others to breach their contracts, or interfering with an advantageous business relationship. Thus, agents using the MLS are already fully protected from the potential that Reifert will steal their customers, as Wisconsin defines such theft. The handshake rule is far more restrictive than Wisconsin law.

NAR has created its own body of rules prohibiting competition across the United States that goes much farther than any state law. The rules are enforced in secret prosecutorial sessions leading up to expulsion from the MLS if a violation is found. Early in his career, Reifert violated the rule, was fined, and he has not violated the rule since. But he would like to.

The substantial question for this Court is whether the handshake rule should be federal antitrust law. The GAO report concluded that price competition across the U.S. is absent. This case forcefully explains why such competition is absent in half of all real estate transactions – the half relating to buyer services.

Related questions: Should review of NAR's rule be facial, as in *Professional Engineers*? Or deferential, as the Seventh Circuit held.

The record evidence also explains how NAR's no-contact rule interferes with the *other* half of all real estate transactions, relating to the sell-side. Under the no-contact rule, if a listing is about to expire, all real estate agents are prohibited from sending letters to the seller advising that, since the house didn't sell in the initial listing period, they might want to list with a low commission agent so as to be able to effectively lower the price of the home without losing any of the net sale proceeds. Such price competition would be fully consistent with the Sherman Act's goals.

The prohibited contact would interfere with no listing contract since it would propose to take effect *after the first listing expires by its terms.*

In record testimony, NAR admitted it was unaware of any harms avoided by the no-contact rule.

This case presents the Court with: An authoritative government report concluding there is an absence of price competition in the real estate brokerage industry, with total commissions of $61 billion paid in 2004 (GAO report, pg. 1); (2) NAR rules enforced nation-wide inhibiting competition on both the buy-side and sell-side of transactions; (3) that are enforced involuntarily through MLS tie-ins on over 250,000 realty agents, and voluntarily assumed by another 750,000 (yes – many agents approve of lack of price competition, but

consumers do not); and (4) a petitioner who is restrained by respondents' and NAR's rules from competing in ways that are legal under state law.

In short, Reifert has the answer to why real estate commissions are not competitive. The Seventh Circuit shrugged off the answer, but this Court should not.

F. NAR's MLS restraints challenged by the United States Two weeks before the filing of this petition the United States district court for the Northern District of Illinois filed its memorandum order denying NAR's motion to dismiss the government's case against it for national restraints relating to MLS practices. *United States v. National Assn. of Realtors*, 2006 U.S. Dist. LEXIS 86963 (N.D. Ill. Nov. 27, 2006). The government claims "NAR and its members have adopted policies and by-laws (that is, the two VOW policies), enforced by sanctions for non-compliance, that restrain competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers." *Id.* at *37 (internal quotations omitted).

In *US v. NAR* the MLS is central to creation and use of data that may be displayed through VOWs (virtual office websites). Reifert's case does not depend on the outcome of *US v. NAR*. However, the restraints alleged in *US v. NAR*, and NAR's insistence on enforcing those restraints, show the restraints alleged here are a substantial part of a national campaign by NAR to reduce competition in the brokerage market.

G. This case is controlling rulings across America The Sixth Circuit affirmed summary judgment for a Realtor association in a parallel NAR-MLS tie-in case, *Buyer's Corner Realty, Inc. v. Northern Kentucky Assn. of Realtors*, 2006 U.S. App. LEXIS 25157 (6th Cir. 2006). The Sixth Circuit issued a panel decision adopting the district court opinion in *Buyer's*

Corner Realty, Inc. v. Northern Kentucky Assn. of Realtors, 410 F.Supp.2d 574 (E.D. Ky. 2006), which relied primarily on the district court decision in this case.

Likewise, the federal district court in Spokane, Washington was influenced by this case in entering summary judgment for defendants in an MLS tie-in case. "Plaintiffs have failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement." *Id.* at *8. *Prencipe v. Spokane Bd. of Realtors*, 2006 U.S. Dist. LEXIS 29828 (E.D. Wa. 2006), at *8.

Nine federal judges have now ruled that trade associations of realty agents interested in supporting the interests of Asians, Hispanics, African-Americans, and other minorities, must be excluded as competitors of NAR for skin color reasons.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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